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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1126

CLARA L. WASHINGTON,
Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,
Respondent.

REPLY BRIEF

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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To The Honorable Mr. Chief Justice
and to The Honorable Mr. Justices
of The Supreme Court of the United States:

STATEMENT

That neither the petitioner nor counsel for petitioner has ever approved of the recitations in the judgment either as to form or substance, rendered in behalf of the respondent on respondent's motion for summary judgment, which is evidenced by the fact that such judgment was never signed by counsel for petitioner. (Tr-32) That neither petitioner, nor her counsel has waived any right to which petitioner is entitled. (Tr-36).

That petitioner, prior to the 10th day of notice to her of the hearing of the motion for summary judgment, filed an affidavit opposing such motion for summary judgment,

which is in accord with the provisions of rule 166-A, Texas Rules of Civil Procedure. (Tr-26, 27)

REASONS FOR GRANTING THE WRIT

1. In Tobin v. Garcia and Parr, 316 S.W. 2d 396 (1958) the Supreme Court of Texas held that "The right to summary judgment was unknown to the common law and exists only by virtue of rule providing therefor, and in order to be entitled to benefits of such rule, all of its terms must be complied with. Rules of Civil Procedure, rule 166-A."

And in Gardner v. Martin, et al, 345 S.W. 2d 274, (1961), the Supreme Court of Texas held: "Summary judgment is possible only by virtue of rule of court, and to entitle party thereto, provisions of the rule must be strictly complied with. Rules of Civil Procedure, rule 166-A."

That the trial court granted the motion for summary judgment to respondent against petitioner, when petitioner had only 9 days notice of such motion for summary judgment. (Tr-33, 34, 35, 36, 41). That under rule 166-A, petitioner was entitled to 10 days notice of such motion for summary judgment. That therefore the granting by the trial court of a summary judgment for respondent was arbitrary, and deprived petitioner of due process of law and equal protection of the laws under the 14th Amendment to the Constitution of the United States.

2. Under rule 374, Texas Rules of Civil Procedure, the assignments of error on appeal or writ of error shall be set out and raised in the motion for new trial. Petitioner set out her Federal claim in her motion for new trial, (Tr-34), and said motion for new trial was presented to and heard by the trial court. Too, the trial court could not under rules of civil procedure of Texas have a hearing on the motion for summary judgment until after 10 days notice of such motion to the opposite party.

Petitioner raised the Federal questions sought to be reviewed in the Court of Civil Appeals by Eighth Point of Error, in the brief of appellant which brief was filed within the time prescribed by rule 414, Texas Rules of Civil Procedure. Under rule 415, the appeal could be dismissed for failure of appellant to file her brief within the time prescribed.

At the time that the appellant filed the brief of appellant in the Court of Civil Appeals, it was not known whether the Court of Civil Appeals would reverse its ruling on rehearing or whether the Supreme Court of Texas would reverse the Court of Civil Appeals. For the Supreme Court of Texas could have adhered to the rule laid down in *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430 (Tex. Civ. App. writ ref.); (See page 5 of Petition for a Writ of Certiorari) Under Texas law, the refusing of the application for writ of error amounts to an affirmance by the Supreme Court of Texas of the opinion of the Court of Civil Appeals.

Under the authority of the Holland case, it was concluded that the last date for the filing of the appeal bond would be May 26, 1966. The appeal bond was filed on May 20, 1966. (Tr-43).

And also by rule 329b, paragraph 4, since the motion for new trial was presented to the court within 30 days and was determined by the court prior to the 45th day, it was concluded that the motion for new trial was not overruled by operation of law. (See pages 3 and 4, of Petitioner's Motion for Rehearing).

Under rule 469, Texas rules of civil procedure, in an application for writ of error to the Supreme Court of Texas, the points of error relied upon shall be stated in short form and be germane to some assignment of error

in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the court of civil appeals.

In the points and points of error as set out in the appellate courts of Texas, in this case, such points were germane to some assignment of error in the motion for new trial in the trial court, and germane to the Federal questions sought to be reviewed and which were raised in the appellate courts of Texas.

3. In addition to the above, courts of civil appeals have authority and duty to consider fundamental errors apparent upon the face of the record though not assigned. *Murray* v. *Briscoe,* 209 S.W. 2d 976. When the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter, the error will be regarded as fundamental. Thus, even though the error asserted to be fundamental is not called to the attention of the trial court, and not assigned as error on appeal, the appellate courts are under the duty to consider and determine such error whether raised by the litigants or by the court on its own motion. In *Ramsey* v. *Dunlop,* 205 S.W. 2d 979, the supreme court of Texas held: "Appellate courts may consider fundamental errors though they are not assigned."

For the state trial court to grant a motion for summary judgment to the movant on only nine days notice to the opposite party when the rule of civil procedure requires 10 days notice was fundamental error, for the motion for summary judgment was not ripe for hearing, and the state trial court would not have jurisdiction of the subject matter until after 10 days notice to the petitioner of the motion for summary judgment.

4. The assertion of Federal rights when plainly and reasonably made is not to be defeated under the name of local practice. *Davis, Director General of Railroads* v. *Wechsler,* 263 U.S. 22, 24.

Even though the claimed constitutional protection be denied on non-Federal grounds, it is within the province of the Supreme Court of the United States to inquire whether the decision of the state court rests upon a fair or substantial basis. If insubstantial, constitutional obligations are not to be thus avoided. *Lawrence* v. *State Tax Commission,* 286 U.S. 276, 282.

It is within the province of the Supreme Court of the United States to inquire not only whether the Federal right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without fair or substantial support. *Ward et al* v. *Board of County Com'rs of Love County, Okl.,* 253 U.S. 17, 40 Sup. Ct. 419; *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 247 U.S. 464, 38 Sup. Ct. 566.

CONCLUSION

For the reasons above and for the reasons stated in Petition for a Writ of Certiorari to the Supreme Court of Texas, petitioner prays that the Supreme Court of the United States grant this petition for a Writ of Certiorari, and for other relief as prayed for in her petition for a Writ of Certiorari.

Respectfully submitted,

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